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April 21, 1992

**ORIGINAL
FILE**

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APR 22 1992

FCC MAIL BRANCH

Ms. Donna Searcy, Secretary
Federal Communications Commission
2025 M Street NW
Washington, DC 20554

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APR 22 1992

Re: Dry Prong Educational Broadcasting Foundation

Federal Communications Commission
Office of the Secretary

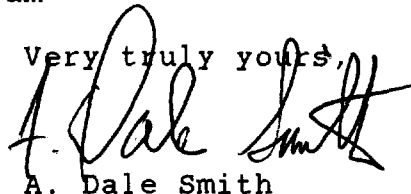
Dear Ms. Searcy:

Please find enclosed original Opposition to "Motion to Enlarge Issues" and six copies in the captioned matter.

If you have any questions, please do not hesitate to call.

With kindest regards, I am

Very truly yours,



A. Dale Smith

ADS/fes

cc: Honorable Edward J. Kuhlmann
Administrative Law Judge
2000 L Street NW
Room 220
Washington, DC 20554

Robert Zauner, Esq.
Hearing Branch
Federal Communications Commission
2025 M Street NW
Room 7212
Washington, DC 20554

F. Joseph Brinig, Esq.
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1818 N Street NW, Suite 200
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APR 22 1992

FCC MAIL BRANCH

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)	MM Docket No. 92-2
)	
DRY PRONG EDUCATIONAL BROADCASTING)	File No. BPED-900305MF
FOUNDATION)	
)	
For Modification of Non-Commercial)	
Station KVDP(FM), Dry Prong, LA)	
)	
MISSIONARY ACTION PROJECTS)	File No. BPED-900905MK
)	
For Construction Permit for a New)	
Non-Commercial FM Station on)	
Channel 210 at Alexandria, LA)	
)	

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APR 22 1992

TO: Honorable Edward J. Kuhlmann
Administrative Law Judge

Federal Communications Commission
Office of the Secretary

OPPOSITION TO "MOTION TO ENLARGE ISSUES"

Dry Prong Educational Broadcasting Foundation, by its attorney, hereby respectfully opposes the "Motion to Enlarge Issues" filed in this proceeding by Missionary Action Projects on April 3, 1992. In opposition thereto, it is alleged:

1. In a Motion to Enlarge Issues ("Motion") filed in this proceeding on April 3, 1992, Missionary Action Projects

("MAP") alleges that there has been a transfer of control of KVDP¹ from Dry Prong Educational Broadcasting Foundation ("Foundation") to a corporation, Dry Prong Educational Broadcasting Foundation, Inc. ("Corporation"). The Motion is predicated on an ownership report dated February 25, 1992 and signed by Coy Edwards, one of the trustees of the Foundation. In that report, Mr. Edwards purports to show that control of Station KVDP has been transferred from the Foundation to the Corporation. As will be shown hereinafter, the report, purporting to show that the station is owned by the Corporation, was a mistake pure and simple, committed by Mr. Edwards, who acted upon a mistaken premise and filed the report without first seeking the advice of legal counsel.

2. Before discussing these matters, however, we will first discuss the general law concerning unlawful transfers of control. In Peoria Community Broadcasters, Inc., 47 Pike and Fischer RR 2d 1463, 79 FCC 2d 311 (1980), the Commission discussed the indicia, which show whether an unauthorized transfer of control has taken place. The Commission made the following statement:

"Unauthorized Transfer of Control. The Commission has provided both general and specific guidance as to what constitutes 'control' of a licensed facility within the meaning of Section 310(d) of the Communications Act, 47 USC § 310(d). In WWIZ,

¹ The issue requested in the Motion refers to Station KWDF. However, in other portions of the Motion, the call letters are referred to as KVDP(FM). The correct call letters are KVDP.

Inc., 36 FCC 561, 579 [2 RR 2d 169] (1964), we stated:

' . . . in determining control, the Commission looks beyond mere legal title and considers whether other factors may lend dominance to a party nominally having only a minority interest. Thus, we stated in Town and Country Radio, Inc., . . . [28 FCC 129, 151 [15 RR 1035] (1960). 'The Commission has repeatedly held that passage of control need not be legal control in a formal sense, but may consist of actual control by virtue of the special circumstances presented, ' . . . [Citations omitted]. 'Control' as used in Section 310(d) of the Act embraces 'every form of control, actual or legal, direct or indirect, negative or affirmative.' . . . " (Citations omitted.)

In Lorain Journal Company v. FCC, 351 F 2d 824, 829 [5 RR 2d 2111] (DC Cir. 1965), the United States Court of Appeals affirmed WWIZ, Inc., and specifically approved the Commission's definition of 'control.' Further, in WWIZ, Inc., we stated that ' . . . preparation and processing of corporate minutes; processing and filing of reports and applications with the Commission; review of advertising contracts of the station; payment of salaries to employees of the station; and amortization of debts owned by the station, id. at 573, as well as keeping the station's books, controlling the station's checking accounts and scrutinizing the station's receipts and expenditures, id. at 582, constitute manifestations of 'control' within the meaning of Section 310(d)."

2. Thus, the Commission indicated that a transfer of control can occur either through option of law or through a set of factual circumstances which bring about a de facto transfer of control, even though there has been no de jure transfer of control.

Recently, in Shawn Phalen, 7 FCC Rcd 623 (Rev. Bd. 1992). The Review Board pointed out that the power to control the purse strings of a broadcast station can bring about a transfer of control. The Board stated as follows:

"At the same time, a financier can use that leverage as a bludgeon with which bend a license to its will, as the Commission continues to recognize. See Benito B. Rish, M.D., 6 FCC Rcd 2628 (1991) (inter alia, 'finances can demonstrate that control has been relinquished to another unauthorized person'). So did the court, over 50 years ago, in Heitmeyer v. FCC, 95 F. 2d 91, 99 (D.C. Cir. 1937), when it held:

It is well known that one of the most powerful and effective methods of control of any business, organization, or institution . . . is the control of its finances . . .

'[T]he burden is and should be upon the applicant to satisfy the Commission, not only that he has financial ability to construct and operate a station, but financial ability to construct and operate it free of control, direct or indirect . . .

See also WLOX Broadcasting Co., v. FCC, 260 F. 2d 712, 715-16 (D.C. Cir. 1958) (financial leverage can effect control)."

Footnotes omitted.

3. In the case at bar, there has been absolutely no transfer of control of Station KVDP. Attached hereto and marked Exhibit A is a declaration executed by Coy Edwards, the Foundation trustee who filed the ownership report which resulted in the Motion. As Mr. Edwards points out, there is, in fact, an entity

known as "Dry Prong Educational Broadcasting Foundation, Inc.". It was organized by Mr. Edwards, in order to provide a basis to obtain tax exempt status from the IRS. However, the Corporation was never activated; Mr. Edwards simply organized the Corporation with the thought that, some time in the future, the unincorporated Foundation would convey the station's license and the station's license to the Corporation. Mr. Edwards never actually got around to taking any of the actions necessary to effectuate such a conveyance. As a result, the Corporation has never done any business. It has no assets of any kind. It has no bank account and has never had a bank account. It has never received or disbursed any monies. It has never filed any tax returns. It is, in short, a mere "shell", which has never done any business of any kind.

4. These things being so, it was a mistake to file the ownership report for the Corporation with the FCC. However, at the time when MAP filed its lengthy request for admissions in this proceeding, relations between Coy Edwards and the Foundation's then legal counsel had become strained. Mr. Edwards saw numerous references to the Corporation in MAP's request for admissions. Mr. Edwards decided that he should call the FCC to find out whether a report should be filed for the Corporation. He did so and reached a clerk who suggested that a report be filed on FCC Form 323-E.

The clerk mailed Mr. Edwards a form; Mr. Edwards filled it out and sent it in.

5. This was, of course, a serious error. It was an error for several reasons: first of all, Mr. Edwards should not have sought to file an ownership report for an entity which he knew was inactive and was not, in fact, involved in the operation of the station. Second, Mr. Edwards should not have filed any reports whatsoever, without first consulting legal counsel. The fact remains, however, that to the extent that the report purports to show that the Corporation is involved in the operation of KVDP, the report is just plain wrong.

6. We do not ask the FCC to take Mr. Edwards' word for all of this. Rather, Mr. Edwards' statement can be fully corroborated. Attached hereto as Exhibit B is a declaration of Bruce Melder, the accountant who has been retained by the Foundation since August of 1990 and filed its tax returns. As Mr. Melder confirms, no bank account has ever been established for the Corporation; the Corporation has no assests; no monies have ever been funneled through the Corporation; no checks have ever been written on behalf of the Corporation; and no tax returns have been filed for the Corporation. The Corporation has, in fact, never done any business whatsoever. As further corroboration of these facts, there is attached hereto as Exhibit C a specimen of the

checks used to make payroll at Station KVDP. As can be seen, the payroll account continues to be maintained by the licensee, i.e., the unincorporated Foundation. The Corporation has never played any role, whatsoever, in the finances of the station and all of the station's assets continue to be titled to the unincorporated Foundation (See Exhibits A and B).

7. In short, the Motion stems entirely from a mistaken and erroneous ownership report filed by one of the Foundation's trustees, who had not consulted counsel and did not know what he was doing. The Foundation regrets the error and regrets and inconvenience which may have been caused to either the FCC or the private parties as a result of this mistaken act. It was, however, a mere mistake. As we have demonstrated, there has been absolutely no change in the control of Station KVDP. It continues to be controlled by the Foundation and, while a Corporation has been organized looking towards a future assignment of the KVDP license, such an assignment has not yet and, for that matter, may never take place. Thus, the Motion is without merit and must be denied.


April 21, 1992

Respectfully submitted,

DRY PRONG EDUCATIONAL
BROADCASTING FOUNDATION

A. DALE SMITH & ASSOCIATES
P.O. Box 826
104 Morgan Street
Ball, Louisiana 71405

By:


A. Dale Smith
Its Counsel

CERTIFICATE OF SERVICE

I, A. Dale Smith, hereby certify that on this 21st day of April, 1992 copies of the foregoing "Motion to Enlarge Issues" were sent via first class mail, postage paid, to the following offices:

Judge Edward J. Kuhlmann
Federal Communications Commission
2000 L Street, Room 220
Washington, DC 20554

Robert A. Zauner, Esq.
Hearing Branch, Enforcement Division
Mass Media Bureau
Federal Communications Commission
2025 M Street NW, Suite 7212
Washington, DC 20554

F. Joseph Brinig, Esq.
Brinig and Bernstein
1818 N Street NW, Suite 200
Washington, DC 20036
Counsel for Missionary Action Projects

Date: April 21, 1992


A. Dale Smith

EXHIBIT A

STATE OF LOUISIANA)
 : ss
PARISH OF RAPIDES)

D E C L A R A T I O N

Pursuant to § 1.16 of the Rules and Regulations of the Federal Communications Commission, Coy Edwards hereby declares under penalty of the laws of perjury that the following is true and correct:

1. I am a trustee of Dry Prong Educational Broadcasting Foundation ("Foundation"). On or about February 10, 1984, the Foundation filed an application with the FCC for a construction permit for a new non-commercial educational broadcast station at Dry Prong, Louisiana. Our Foundation has been operating Station KVDP-FM, Dry Prong, Louisiana, since October 21, 1985, when the station first went on the air pursuant to program test authority. The FCC ownership file for Station KVDP correctly reflects the ownership of the Foundation. We presently have four trustees, namely myself, Leta Edwards, Maxwell E. Latham, Jr., and Gayle Tyler.

2. Some time in November, 1990 I decided to apply for tax exempt status for our Foundation, which was not incorporated at that time. I took it upon myself to call the Internal Revenue Service ("IRS") and I was told, in substance, that we ought to incorporate. Thereafter, in January, 1991, I did, in fact, cause a corporation to be organized known as "Dry Prong Educational Broadcasting Foundation, Inc." ("Corporation"). Subsequently, the Corporation made an application to the IRS for tax exempt status, but the IRS rejected the application because of certain problems in the corporate articles and the structure of the Board of Directors. Thereafter, I caused the articles of incorporation to be modified and the Board of Directors to be expanded in order to satisfy IRS requirements and, on February 11, 1991, the IRS granted tax exempt status.

3. However, I never "followed through". The Foundation never conveyed title to the radio station or any of the radio station property to the Corporation. No bank account was ever established for the Corporation. No books of account were ever kept for the Corporation. The Corporation never took any corporate actions. I anticipated that, eventually, the Foundation would, in fact, turn the control of the radio station over to the

Corporation, but I was in no hurry about this and no actions were taken in that direction. However, when I received a lengthy list of requests for admissions filed in the FCC proceeding involving the application of the Foundation for an increase in power and change in frequency at Station KVDP-FM. At the time, the Foundation was being represented by Lewis Cohen, an attorney in Washington, D.C. However, relations between myself and Mr. Cohen had become strained. Therefore, I was having little communication with him at that time.

4. In the request for admissions, MAP made reference to the Corporation "Dry Prong Educational Broadcasting Foundation, Inc.". I got to thinking about the Corporation and I decided to call the FCC in Washington and ask them whether the existence of the Corporation should be formally disclosed. I spoke to a clerk in the Ownership Branch who advised me that I should fill out and file FCC Form 323 (ownership report) for the Corporation. I did so.

5. Subsequently, I have been advised by legal counsel that I should not have filed the report for the Corporation, because the Corporation is not the licensee of Station KVDP, and the Corporation has played no part in the operation of the station. I hereby categorically deny that the Corporation has been active in any way. It has no bank account and has never had a bank account. It has not filed any tax returns, because it has not done any business. No check has ever been written to the Corporation and the Corporation has never written any checks to anybody. It is simply a "shell" awaiting the day when we may decide to assign to it the station license. Our attorney, Dale Smith, was in error when, in a letter dated March 27, 1992, he implied that the Corporation had received any donations from listeners or others. It has never received any donations from anyone.

6. Under these circumstances, I realize that my action, filing an ownership report in the name of the Corporation, was a mistake. That action was taken without benefit of the advice of legal counsel. In the future, I will take no further actions involving the FCC or the IRS without first consulting counsel.

Further declarant sayeth not.

COY EDWARDS

Dated this 20th
day of April, 1992.

By:


Coy Edwards

EXHIBIT B

STATE OF LOUISIANA

PARISH OF RAPIDES

D E C L A R A T I O N

Pursuant to § 1.16 of the Rules and Regulations of the Federal Communications Commission, I, Bruce Melder, hereby declare under penalty of the laws of perjury that the following is true and correct:

I am a certified public accountant licensed under laws of the State of Louisiana, and in connection with my accounting practice I have been retained as the accountant for the Dry Prong Educational Broadcasting Foundation (Foundation) since August of 1990, and have prepared and filed its tax returns since that time. No bank account has ever been established for Dry Prong Educational Foundation, Inc. (Corporation), the Corporation has no assets, no monies have ever been funneled through the corporation, no checks have ever been written on behalf of the corporation, and no tax returns have been filed for the corporation, all to the best of my knowledge.

To the best of my knowledge, all monies have been funneled through the Foundation, all checks have been written on behalf of the Foundation and all tax returns have been filed in the name of the Foundation.

Further, declarant sayeth not.

BRUCE MELDER

By:



BRUCE MELDER

Dated this 20th day
of April, 1992.

EXHIBIT C

KVDP RADIO
DP EDUCATIONAL BROADCASTING FOUNDATION

3242

84-163/1111

*P.O. Box 214
Dry Prong, La 71423*

PAY
TO THE
ORDER OF

19

\$

DOLLARS

 Colfax Banking Company
P.O. BOX 247 COLFAX, LOUISIANA 71417

FOR

Oliver Edwards

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⑈0117501⑈